Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

COOK INLET PROCESSORS, INC.,
Petitioner,

GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; et al.
Respondants; and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,
Respondants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW.

1. Under the Seventh Amendment to the United States Constitution, and the applicable common law, procedural laws, and substantive laws, does a district court have the authority to disregard a jury verdict finding each member of a class entitled to punitive damages based upon liability "evidence" that was available during the trial, but that was never asserted by the defendant, nor admitted into evidence, and an affirmative defense and legal theory that was never asserted by the defendants or considered by the jury?

2. In a mandatory punitive damages class action (with multiple categories of claimants asserting punitive damages and individual compensatory damages claims), does it violate basic notions of res judicata, due process and finality to deprive, post-verdict and post-approval of the plan of allocation of punitive damages to each category of claimant, a class member of such punitive damages to which a jury has ruled each member of the class is entitled, during the distribution of the proceeds of that verdict, by summary reliance on purported affirmative defenses which were never properly procedurally or substantively pled, litigated or considered by the jury?

2. May a district court, through the approval of a plan of distribution which functionally excludes a class member, divest, via such post-verdict summary resurrection of such forfeited and waived affirmative defenses (i.e., alleged pre-suit partial releases and/or accord and satisfaction), a class

member of its right to share in a punitive damages verdict awarded by the jury to the class after that class member has detrimentally procedurally and substantively relied on inclusion in the class, a joint prosecution agreement, inclusion in a plan of allocation between categories of class members, and an express "guarantee" of sharing in the punitive damage verdict proceeds in giving up its rights to proceed to try its compensatory damages claims?

3. May a district court discriminate against a member of a mandatory punitive damages class certified pursuant to Federal Rule of Civil Procedure 23 to preclude that class member from enjoying full participation in the distribution of the proceeds of a punitive damages jury verdict to the members of the class based upon summary eleventh hour invocation of an alleged pre-suit "release" of punitive damages purportedly executed by that individual class member when that "release" was never asserted pretrial as an affirmative defense as required, or tried to the jury as such a defense to the punitive damages claims of the members of the mandatory punitive damages class, and when it was asserted for the first time years after the jury verdict holding that each member of the mandatory punitive damages class was entitled to an award of punitive damages, thereby summarily reversing the findings of the jury as to a specific class member?

4. May a district court summarily rely, post-verdict and post-approval of a plan of allocation, on the terms of a so called pre-suit "release" in excluding a member of a mandatory punitive damages class from sharing in the

distribution of proceeds of a punitive damages verdict awarded to the class, when neither that document, nor the class member's defenses to the use of the terms of the document, such as economic coercion, and fraud in the inducement, were tried to or adjudicated by the jury, and as to which the affected class member was not given notice and an opportunity to present its defenses to the enforcement of the alleged "release" before such jury?

5. May a district court approve a plan of distribution of proceeds of punitive damages that discriminates against a class member based upon the recommendation of a "plaintiffs' committee" that authored the plan and engineered said discrimination, when such discrimination is contrary to a joint prosecution agreement, and a "guarantee" in the plan of allocation to the class members, of sharing in such punitive damages proceeds to receive at a minimum compensation for compensatory damages, on which joint prosecution agreements and guarantee the class members relied, when the representative of that committee candidly admitted, prior to the district court's approval of said eleventh hour discrimination in the plan of distribution, that the plaintiffs' committee had refused to consider the legal validity of the "release" it relied upon in formulating its discriminatory distribution plan, or the effected class member's defenses to the use of the alleged terms of the document?

6. Does it violate a class member's rights to due process of law, right to jury trial and fundamental fairness to summarily preclude a member of a mandatory punitive

damages class from participating fully in the distribution of a jury award of punitive damages to the mandatory punitive damages class based upon summary invocation of an alleged pre-suit "release" of punitive damages asserted for the first time after the jury verdict?

II. LIST OF PARTIES

COOK INLET PROCESSORS, INC.,
Petitioner,

GRANT BAKER, as class representatives of the Mandatory Punitive Damages class; and all persons similarly situated; ALASKA SPORT FISHING ASSOCIATION; LOUIS E. ALBER, AHMET ARTUNER; JEFFREY BAILEY; WILLIAM BENNETT; MICHAEL WAYNE BULLOCK, ROBYNE L. BUTLER; ALBERT RAY CARROLL; DEBRA LEE, INC.; DEW DROP, INC.; LARRY L. DOOLEY, MARK DOUMIT; STEVE DOUMIT; DOUGLAS R. JENSEN; DENNIS G. JOHNSON; DONALD P. KOMPKOFF, Sr.; JOSEPH KOPECKY; DANIEL LOWELL; ANDREAN E. MARTUSHEFF; CAROL ANN MAXWELL; JACQUELAN JILL MAXWELL; ROBERT A. MAXWELL, Sr.; MICHAEL McLENAGHAN; ELENORE E. McMULLEN; LESLIE R. MEREDITH; NATIVE VILLAGE OF TATITLEK; LEONARD S. OGLE; STEVEN T. OLSEN; AUGUST M. PEDERSEN, Jr.; MARY LOU REDMOND; JOSEPH DAVID STANTON; JEAN A. TISDALL; DARRELL WOOD,
Respondants; and

EXXON CORP., aka Exxon Mobil Company; Captain JOSEPH HAZELWOOD; EXXON SHIPPING CO.,
Respondants.

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Petitioner, Cook Inlet Processors, Inc., respectfully prays a Writ of Certiorari issue to review the judgment and opinion herein of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Alaska.

V. REFERENCE TO OPINIONS IN THE CASE.

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum opinion filed December 14, 2000 in Ninth Circuit No. 99-35864 and the related case of Nautilus Marine Enterprises, Inc., Plaintiff-Appellant v. Grant Baker, et al., Plaintiffs-Appellees, and Exxon Corp., et al., Ninth Circuit Case No. 99-35866, (consolidated for purposes of proceedings in the Ninth Circuit) (Appendix (hereinafter "App.") 1). Petitioner's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied January 26, 2001. (App. 38.) The Honorable H. Russel Holland's unpublished findings and conclusions were entered July 23, 1999 in United States District Court Alaska Case No. A89-095-CV (HRH) (Consolidated). (App. 31-37.) Also relevant to this case are the Ninth Circuit's decisions in the related cases of Icicle Seafoods, Inc., et al. and Exxon Shipping Company, et al. v. Grant Baker, et al., Ninth Circuit Court of Appeals No. 96-36038; Icicle Seafoods, Inc., et al. v. Alaska Sportsfishing Association, Inc., et al., Ninth Circuit Court of Appeals No. 97-35036, and Icicle Seafoods, Inc., et al. v. Grant Baker, et al. v. Exxon Corporation, et al., Ninth Circuit Court of Appeals No. 97-35190 (App. 5-26), and in Sea Hawk Seafoods, Inc., et al, and Western Alaska Fisheries Inc., v. Exxon Corp and Discovery Master, No. 99-35878 (App. 27-30.)

VI. STATEMENT OF RELATED CASE

Also filed this day is a petition for certiorari in the related case of Nautilus Marine Enterprises, Inc., Plaintiff-Appellant v. Grant Baker, et al., Plaintiffs-Appellees, and Exxon Corp., et al., Ninth Circuit Case No. 99-35866, which involves many of the same facts and issues as raised in the instant matter, and which likewise requires an exercise of this Court's supervisory powers.

VII. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Judgment and Opinion was filed December 14, 2000; a timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied January 26, 2001.

VIII. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fifth Amendment of the United States Constitution, the Seventh Amendment of the United States Constitution, and Rule 23 of the Federal Rules of Civil Procedure. Those Constitutional Provisions provide:

> **Fifth Amendment; United States Constitution**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Juyr, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment; United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 23 of the Federal Rules of Civil Procedure is set out in the Appendix, pages 132-134.

IX. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

This petition seeks review of the Ninth Circuit's opinion in Case Number 99-35864, an appeal by Cook Inlet Processors, Inc. (hereafter "Cook Inlet" or Cook Inlet Processors), in which the Ninth Circuit affirmed the trial court's order approving the eleventh hour discrimination against Cook Inlet, summarily divesting it of its share as a class member of a mandatory punitive damages class, of punitive damages awarded to the members of that class by

the jury, via a "seafood processor plan of distribution" resulting from the "Exxon Valdez oil spill litigation," which plan of distribution was contrary to the plan of allocation, joint prosecution agreement, and class certification on which Cook Inlet had relied. Cook Inlet had appealed the approval of the plan of distribution of funds that included the proceeds of a punitive damages jury verdict awarded to the members of the mandatory punitive damages class. That plan arbitrarily, summarily and at the eleventh hour, with no proper procedural or substantive notice, pleading, adjudication, or jury consideration, excluded Cook Inlet from receiving punitive damages proceeds on the basis of "affirmative defenses" that were never raised in a timely fashion, even though Cook Inlet was a member of the class to which the jury awarded punitive damages. Thus, said appeal was asserted on the grounds that the mandatory affirmative defense of the alleged pre-suit "release" of punitive damages claims used to summarily exclude Cook Inlet during the distribution phase had never been properly procedurally or substantively raised, litigated or considered by the jury and had been substantively, procedurally, and strategically abandoned by the Exxon defendants as part of their trial strategy (presented to the jury in the form of Exxon's testimony that it had only received "receipts" for the settlement money that it had paid out and not "releases"). Thus, the terms of the document and Cook Inlet's defenses to same were not presented to the jury, but were, rather, asserted for the first time after the jury verdict finding Exxon liable for punitive damages to the members of the punitive damages class. However, both the plaintiffs' committee and the district court belatedly seized on the terms of the document at the eleventh hour, despite the jury verdict, longstanding principles of res judicata and finality, Cook Inlet's reliance (in foregoing its right to individually seek compensatory damages) on its status as a class member and

signatory to the joint prosecution agreement, Cook Inlet's inclusion in the earlier plan of allocation, with an expressed "guarantee" in such plan of allocation of Cook Inlet's entitlement to share in said punitive damages proceeds, and Exxon's abandonment of the provisions of those documents, and the plaintiffs' committee used the document to summarily divest Cook Inlet of its right to share in the punitive damages verdict awarded to it. Despite its objections, Cook Inlet was provided neither a jury trial nor an opportunity for discovery or to present its defenses to the assertion of "release" (such as fraud, reliance, economic duress, etc.) and the use of the terms of that document to exclude it from receiving those damages to which the jury found Cook Inlet entitled. In fact, neither the plaintiffs' committee nor the court considered or adjudicated the actual legal validity of the purported "release" or Cook Inlet's defenses to same, but simply accepted a prejudicial interpretation of the language with no proper opportunity for notice, defense, discovery, or adjudication by a jury.

A. INTRODUCTION

What occurred in this case was that a mandatory punitive damages class action against Exxon was certified. Cook Inlet Processors was part of that class. The punitive damages claims went to the jury, which returned a verdict in favor of the members of the punitive damages class of $5 billion. During the jury trial, Exxon did not properly procedurally or substantively assert the mandatory affirmative defenses of release or accord and satisfaction with relation to any of the individual members of the class. Rather, Exxon told the jury that Exxon had paid out substantial sums of money and only obtained "receipts" in return, and not "releases," thereby attempting to invoke the sympathy of the punitive damages jury. Whether or not

Exxon's strategy actually worked would be speculation. However, the fact remains that the punitive damages jury awarded the members of the mandatory punitive damages class $5 billion in punitive damages against Exxon. Dissatisfied with the jury verdict. Exxon then attempted to raise the terms of several documents which it deemed were releases and/or assignments back to Exxon of various class members' punitive damages claims. One of those class members was Cook Inlet Processors. Rather than give Exxon its sought remittitur, the plaintiffs' committee in the district court excluded certain processors from sharing in the distribution of the punitive damages verdict, despite their class members and those class members' reliance upon promises in the joint prosecution agreement and plan of allocation of a "guaranteed" recovery from the punitive damages proceeds sufficient to satisfy their compensatory damage losses as inducement to "settle" their compensatory damages claims for no cash verdict or additional cash payment in Phase IV, i.e., forego trial and direct recovery of same to expedite judgment on the punitive damages verdict in which they were promised a share. One of the processors so excluded was Cook Inlet Processors.

Should the district court's ruling be permitted to stand, it would constitute a new vehicle through which defendants could attack jury verdicts, particularly in class actions where the distribution phase of the litigation often comes after the actual trial and jury verdict. That is, the district court's ruling would permit any defendant to withhold potential affirmative defenses from the jury and then assert those affirmative defenses, such as release and accord and satisfaction before the trial judge, with no basic due process notice, opportunity to defend, discovery rights, or jury trial rights, during the distribution phase and attempt to prove that a particular individual class member was not

"entitled" to share in the award, notwithstanding the jury verdict. Such a strategy is inconsistent with the purposes of a class action (i.e., once a class action is in fact certified the court has determined that the individual members share common questions and issues of law and fact such that they should be represented by one or more class members who are representative of the class as a whole) and, more important (if it is permissible at all to withhold defenses to a claim from the jury which is determining liability and the amount of damages), at a bare minimum would require a new jury trial to provide such notice and opportunity to defend and for a jury verdict to determine the viability of the defenses that the defendant had decided to hold back from the first jury.

However, in this particular case the unfairness of such situation can obviously be demonstrated as it would permit Exxon, as a matter of trial tactics and strategy to argue to the jury setting the amount of punitive damages (as it did) that Exxon had accepted corporate responsibility and had voluntarily paid out large sums of money while only obtaining "receipts" and not "releases," thereby invoking juror sympathy resulting in a reduced punitive damages award, and then after the fact doing a 180° switch in their position and arguing that those documents were, in reality, releases and/or assignments of damages back to Exxon and that therefore the jury award should be further reduced to reflect the terms of those agreements. Should the district court's ruling be permitted to stand, it would result in a potentially endless series of additional complete jury trials in every class action as to any potential defenses and/or trial strategies that the defendants chose not to assert before the original jury and assert for the first time during the distribution phase.

In this case, however, there was not even a subsequent proceeding with minimal due process rights afforded to Cook Inlet during which the legal viability of Exxon's late-asserted defenses were determined, as both the plaintiffs' committee, the district court and the Ninth Circuit Court of Appeals took the "release" documents at face value and did not provided Cook Inlet Processors with its due process and/or jury trial rights regarding the legal viability of or enforceability of those documents and the defenses available to Cook Inlet, such as coercion, economic duress, reliance and fraud in the inducement. Thus, at the very minimum, Cook Inlet Processors is entitled to a remand of this case to determine the viability of the documents that were used to exclude Cook Inlet Processors from sharing in the punitive damages verdict; however, as explained further herein, as the jury has already rendered its verdict that each member of the mandatory punitive damages class is entitled to punitive damages from Exxon and the purported affirmative defenses were not properly pled or adjudicated, procedurally or substantively, the existence or viability of any defenses that Exxon claims to that punitive damages award is no longer viable or relevant as a matter of law due to the substantive and procedural requirements of pleading affirmative defenses, and the doctrines of res judicata, finality of judgment and the provisions of the Seventh Amendment to the Constitution of the United States of America.

B. THE UNDERLYING ACTION

This case arises from the oil spill from the vessel Exxon Valdez in 1989 and its devastating impact upon the fishing industry in Prince William Sound, Alaska. Numerous actions were filed in State and Federal Court, and were consolidated in the United States District Court for the

District of Alaska. The District Court had jurisdiction pursuant to 28 U.S.C. §1333.

The United States District Court certified a "mandatory punitive damages class" pursuant to Federal Rule of Civil Procedure 23. (App. 44-49). The class included Cook Inlet Processors. The jury returned a punitive damages verdict in favor of the members of the punitive damages class, of $5 billion dollars, upon which a judgment was entered. (App. 42).

Pursuant to the jury verdict, the plaintiffs' committee formed a "plan of allocation" for distribution of the punitive damage proceeds to, among others, the "seafood processor category." (App. 62-99.) It is undisputed that the plan of allocation included Cook Inlet Processors. To expedite the proceedings regarding the $5 billion punitive damages award, the plaintiffs' committee suggested a settlement whereby the claimants would dismiss their compensatory damages claims, to be tried in "Phase IV," in exchange for no additional settlement funds. (App. 62-99.)

Based upon its inclusion in the punitive damages class, its status as a signatory to the joint prosecution agreement, and its inclusion in the plan of allocation, and the Phase IV settlement agreement's "guarantee" of payments from the proceeds of the punitive damages verdict sufficient to remedy its compensatory damages losses, Cook Inlet Processors did not object to the settlement of the compensatory damages phase of the trial for no further money payment from Exxon in order to speed the process of the distribution of the proceeds from the punitive damages judgment and punitive damages verdict. The settlement of the Phase IV compensatory damages claims was approved. As stated by the plaintiffs' committee, the claimants'

motivation behind accepting no additional money for their compensatory damages in the Phase IV settlement was a guaranteed participation in the punitive damages distribution sufficient to compensate for compensatory losses. (App. 75). In reliance on its inclusion, and the "guarantee," Cook Inlet gave up its compensatory damages claims against Exxon and agreed to the settlement.

After the jury verdict, and after the time period to object to the Phase IV settlement and plan of allocation, and despite its representations to the punitive damages jury that it had accepted corporate responsibility by paying out millions of dollars and only obtained receipts (and not releases or assignments) in return, Exxon raised, for the first time, numerous documents which it contended constituted "releases" and/or assignments of some class member's (including Cook Inlet) punitive damages claims, and that, thus, according to Exxon, it was entitled to an offset against the jury verdict. It is undisputed that Exxon never raised these documents to the jury in the context of affirmative defenses of either release, assignment or accord and satisfaction.

Based upon the terms of two of these documents, and without affording basic due process or jury trial rights, the plaintiffs' committee, and later, the district court, disregarded the finality of the jury verdict, established notions of res judicata and Cook Inlet and Nautilus' constitutional rights, class status and reliance, and excluded Cook Inlet and Nautilus Marine from the distribution of the "punitive damages funds."

This case is of importance not only to the individual parties involved, but also to the judiciary as a whole. If permitted to stand, the District Court's decision prohibiting

plaintiffs from receiving damages that were awarded to them by the jury based upon untried, unasserted, and abandoned theories of defense that was raised for the first time after the jury verdict affects the finality of every jury verdict and judgment rendered in federal court, and eviscerates the requirements and standards encompassed in Federal Rule of Civil Procedure 50. The holding permits a defendant to withhold evidence of an alleged defense from the jury, and to attack the verdict during subsequent proceedings using those affirmative defenses.

Thus, this case raises an issue of exceptional importance, i.e., does a district court have the authority to violate the Seventh Amendment and disregard a jury verdict based upon evidence that was never admitted, and a legal theory that was never asserted before the jury?

The decision denying Cook Inlet its due process rights to receive at a minimum its compensatory damages via participation in the punitive damages as "guaranteed" by the joint prosecution agreement (and further "guaranteed" by the Plaintiffs' Committee as to the plan of allocation and the Court's orders approving same) as to which it was a signatory and detrimentally relied in foregoing its own rights to litigate its amount of compensatory damages in the Phase IV (compensatory damages) proceedings presents grave threats and issues to any litigant's due process rights to rely upon such joint prosecution agreements, court orders and jury verdicts in complex or class action litigation.

C. THE ERRONEOUS NINTH CIRCUIT OPINION.

The Ninth Circuit's Cook Inlet and Nautilus Marine opinions ignored the underlying infirmity of both the plaintiffs' committee's and the district court's procedural and

substantive posture in considering Exxon's "defense(s)," after the jury's finding, verdict and judgment based upon the admitted evidence, that Nautilus and Cook Inlet were entitled to punitive damages as members of the mandatory punitive damages class. The jury finding is conclusive as to all claims and defenses that could have been raised.[1]

This error was compounded by the Ninth Circuit's holding that Nautilus and Cook Inlet's defenses to the viability of Exxon's waived affirmative defense fail as, allegedly, Nautilus and Cook Inlet "presented no evidence to support setting aside the release on the basis of economic duress." No such evidence was presented to the jury as Exxon never offered the documents in the first instance. Rather, in an attempt to convince the punitive damages jury Exxon had accepted corporate responsibility, Exxon's president testified that it had only obtained "receipts" for the payments it had made. Therefore, evidence of Cook Inlet's defenses to the abandoned, affirmative defenses of Exxon were irrelevant to the issues before the jury.

The Ninth Circuit also ignored the existence of the mandatory punitive damages class when it found that: "Exxon did not waive the releases by failing to plead them as affirmative defenses because the complaints did not request punitive damages." [sic] Even if such a statement were true (which, as argued by Cook Inlet, it is not) this contradicts the Ninth Circuit panel's direct holding in a companion appeal

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[1] See Cromwell v. County of Sac, 94 U.S. 351 (1876) (a judgment is conclusive as to the claim or controversy); Seventh Amendment to the United States Constitution ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.").

as to a somewhat similarly situated class member, who was allowed on appeal (by reversal of Judge Holland's order) to share in the punitive damages proceeds. That is, as the Ninth Circuit found in the related case of Sea Hawk Seafoods, Inc., et al, and Western Alaska Fisheries Inc., v. Exxon Corp and Discovery Master, No. 99-35878 (App. 27-30), the allegations in the complaint are irrelevant given the Court's certification of the mandatory punitive damages class. Indeed, the Western Alaska panel properly found that no complaint at all need have been filed to entitle members of the class to share in the distribution of the proceeds of a verdict awarded to the mandatory punitive damages class.

X. REASONS FOR GRANTING CERTIORARI.

A. THE NINTH CIRCUIT AND THE DISTRICT COURT, IN APPROVING A PLAN OF DISTRIBUTION WHICH DIVESTS A CLASS MEMBER OF DAMAGES TO WHICH A JURY HAS DETERMINED IT ENTITLED, BASED UPON AN UNTRIED AFFIRMATIVE "DEFENSE" IS IN CLEAR DEROGATION OF THE DOCTRINE OF RES JUDICATA AND THE REQUIREMENTS OF THE SEVENTH AMENDMENT AND FEDERAL RULE OF CIVIL PROCEDURE 50 AND THIS CONSTITUTES SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The laws regarding the finality of a judgment as to claims and defenses has been established for well over a hundred years. In Cromwell v. County of Sac, 94 U.S. 351 (1876), this Court stated that:

> [A judgment] is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

Id. at 352-353, (emphasis added).

Indeed, the Seventh Amendment to the United States Constitution provides that: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." No such provisions have been involved in this case which would permit the usurpation of the jury's authority.

The principle of finality has been cited more recently by this court in Nevada v. United States, 463 U.S. 110 (1983) when the Court cautioned that:

> [W]hat we said with respect to this doctrine more than eighty years ago is still true today; it ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if...conclusiveness did not attend the judgments of such tribunals."

Id. at 129 (quoting Southern Pacific Railroad v. United States, 168 U.S. 1 (1897) (emphasis added).

Once the jury decided that the members of the mandatory punitive damages class (as to which Cook Inlet was a member[2]) were entitled to punitive damages, that finding

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[2] In Exxon had intended to rely on the "release" or "assignment" then the matters should have been raised as affirmative defenses to the claims of the class, or in the context of an objection to class certification. Exxon chose

became final. The subsequent allegation of the existence of a "defense" of release "is of no legal consequence." Cromwell at 352. The jury verdict "is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed." Cromwell at 352-353. The judge could only deviate from the jury verdict by entering a judgment notwithstanding the verdict. (See Federal Rule of Civil Procedure 50). No such motion was made, nor did the evidence actually presented during the trial support such a motion (as would have been required to grant a JNOV, Id.), as Exxon made the strategic decision not to attempt to rely upon the terms of the documents or present evidence of them to the jury and, instead, sought to invoke juror sympathy and attempted to demonstrate corporate responsibility by testifying that it paid out the money, and only obtained receipts, not releases, in return.

Clearly, it did not wish to assert the required affirmative defenses since it did not want the jury to know of the facts that Cook Inlet was prepared to introduce to show duress, coercion and fraud in the manner in which Exxon obtained such "releases."

Thus, even though the jury awarded it punitive damages, Cook Inlet has been divested of that jury verdict without due

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not to do so, as a tactic to create sympathy, and avoid the jury learning of its fraud and coercion, which would have been presented to the punitive damages jury by Cook Inlet in response to such affirmative defenses. Moreover, it is essential to note that Exxon did not assert the terms of the documents as a defense to Cook Inlet's claims or inclusion in the mandatory punitive damages class, rather, they are being relied upon by Cook Inlet's co-plaintiffs in an attempt to exclude Cook Inlet from sharing in the damages award.

process of law, in violation of the Fifth and Seventh Amendments to the United States Constitution, the Federal Rules of Civil Procedure, and hundreds of years of established precedent. Such a disregard is a drastic departure from established standards, and calls for the exercise of the supervisory power of this Court.

B. THIS DIVESTITURE HAS OCCURRED DESPITE NOT ONLY THE DISTRICT COURT'S CLEAR INTRUSION INTO THE PROVINCE OF THE JURY, BUT ALSO DESPITE DETRIMENTAL RELIANCE BY COOK INLET ON NUMEROUS REPRESENTATIONS AND COURT ORDERS OF RECORD, INCLUDING THE JOINT PROSECUTION AGREEMENT, THE PLAN OF ALLOCATION AND THE COURT'S APPROVAL OF SAME, AND THE PHASE IV SETTLEMENT AND THE COURT'S APPROVAL OF SAME

Cook Inlet was repeatedly promised and guaranteed that it would receive at least its compensatory damage losses, from sharing in the punitive damages verdict, and detrimentally relied on same to forgo its right to seek certain individual compensatory damages (which were never the subject of a purported "release") in Phase IV, by agreeing to a Phase IV settlement for no additional money to expedite the punitive damages verdict judgment and receipt of said proceeds.

Cook Inlet Processors has been denied a jury verdict worth millions of dollars by the eleventh-hour summary resurrection of the alleged releases [via utilizing a narrow, one sided, and biased "literal" interpretation of the language of the documents without any due process opportunity for the plaintiffs to develop, or consideration by the Plaintiffs' Committee or court of the factual circumstances (fraud,

duress, coercion) in which they were obtained], contrary to the Seventh Amendment, established Ninth Circuit authority,[3] the Rules of Civil Procedure concerning the conclusive effect of a jury verdict and judgment, the necessity of pleading and litigating affirmative defenses to class claims for punitive damages, Exxon's trial strategy and testimony which estops them from belatedly asserting a claim of release, and basic doctrines of res judicata, i.e., that the jury verdict is conclusive there were no such defenses of "release" and/or "assignment" or "accord and satisfaction" to the Plaintiffs' compensatory and punitive damages claims.

As a result of this "after the fact" summary divestiture of a jury award, neither Cook Inlet nor Nautilus (unlike the other processors included in the plan of allocation and distribution) are receiving even a significant portion of their actual compensatory damages as contemplated and promised by the Phase IV agreements, the plan of allocation and the joint prosecution agreements which they had a contractual right to rely upon and did rely upon[4].

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[3]. Kern Oil & Refining Co. v. Tenneco Oil Co., 840 F.2d 730 (CA9 1988).

[4]. It should be noted that, in the Plaintiffs' Committee's Memorandum in Support of Preliminary Approval and Authorizing Notice regarding the Phase IV settlement, the Committee indicated that a motivating factor in accepting the token Phase IV "settlement" was a trade of the uncertainties of litigation for "a guaranteed participation in the punitive and compensatory damage awards if they are sustained on appeal." (App. 69). The Plaintiffs' Committee also acknowledged that the distribution of those funds (punitive damages proceeds) would be predicated not upon the individual merits or circumstances of any particular plaintiff, but upon the terms of the joint prosecution agreement. (App.

That is, it was an integral, contractual understanding and agreement of said plan of allocation, Phase IV agreement and Joint Prosecution agreement that the punitive damages proceeds, by virtue of either judgment or settlement would be utilized to ensure the plaintiffs at least received their compensatory damages and any excess would then be distributed pro rata according to said compensatory damages as adjusted by risk factors;[5]

70.) Such a position was also consistent with the Ninth Circuit's holding in the related Western Alaska case. Thus, every claimant was to receive its stipulated compensatory damages from the punitive damages verdict, i.e. punitive damage monies via judgment and/or settlement proceeds. The plaintiffs' committee and the district court have now, however, made a drastic departure from established procedure and resurrected a long since abandoned and dead affirmative defense of another party and summarily used it to prevent Cook Inlet from sharing in the award the jury determined it was entitled to.

[5]. Note that total compensatory damages of all class members were at least $2.5 billion, and the compensatory jury award and phase IV agreements were obviously woefully inadequate to compensate such plaintiffs. Thus, it was agreed to utilize, under the joint prosecution agreement, such an allocation/distribution mechanism to initially ensure that all class members at least received their compensatory damages from the punitive damages award. The eleventh-hour exclusion of Cook Inlet and Nautilus Marine means they are now denied 99% ($20,609,822) of same under the plan, or, at a minimum, 76% ($15,764,043) even if the funds paid at the time of the documents is considered as a set off. This functional dismissal of Nautilus and Cook Inlet's claims has occurred despite the fact that, after the $2.5 billion is

Cook Inlet's and Nautilus' compensatory damages, as agreed by the Plaintiffs' Committee were at least $11,846,900 and $8,953,289, respectively. Accordingly, as noted even if the sums initially accepted by them in circumstances constituting coercion, duress and fraud[6] are

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distributed from the over $5 billion in the fund, the remaining $2.5 billion will be distributed pro rata. Thus, even given the processor plans 50% discount, upon distribution of the remaining fund, even the processors that have no claim at all under the district court's Robbins Dry Dock rulings will most likely receive full compensatory damages recovery, whereas Nautilus and Cook Inlet are set to receive about 1% of their stipulated compensatory damages.

[6]. Note that the Alaska cases of Northern Fabrication Company, Inc., v. Unocal, 980 P.2d 958 (Alaska 1999) and Zeilinger v. Sohio Alaska Petroleum Company, 823 P.2d 653 (Alaska 1992) (discussed at oral argument before the Ninth Circuit) discuss the narrow issue of what constitutes coercion (unlike the instant case) where there are full due process rights to litigate the issue (after proper notice and discovery) and the releasor (Exxon) has not affirmatively induced coercive circumstances via fraud and refusal to pay an obvious debt, are not dispositive or even relevant on this issue since the facts herein to support fraud, coercion and duress were not developed due to the basic denial of the right to litigate these issues through the required affirmative defense route via formal discovery and jury trial. However, if given the opportunity, and had Exxon attempted to rely on said documents, the appellants were prepared to present evidence to show that Exxon induced Nautilus and Cook Inlet to undertake certain debts involving payment of lost wages and the like, which Exxon was to indemnify, but then

viewed as a set off as pled by Exxon and as alleged in their trial testimony, even assuming a 50% processor "discount" applies, and the Alyeska settlement funds are discounted, there still remains the sums of $1,924,428 and $2,115,105.50, respectively, as uncompensated compensatory damages[7] from the first $2.5 billion of punitive proceeds "guaranteed" to Nautilus and Cook Inlet by the Phase IV settlement agreement, and $5,923,450 and

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payment for which was unilaterally conditioned on the execution of the release and/or assignment documents. Thus, this case is in accord with Totem Marine v. Alyeska Pipeline Service Company, 584 P.2d 15 (Alaska 1978), and contains the "wrongful conduct" element missing from both Northern Fabrication Company, Inc., v. Unocal, 980 P.2d 958 (Alaska 1999) and Zeilinger v. Sohio Alaska Petroleum Company, 823 P.2d 653 (Alaska 1992). However, it cannot be stressed enough that the proceedings before the Ninth Circuit and the District Court were not based upon a proper pre-trial summary judgment motion or post verdict Rule 50 motion for judgment notwithstanding the verdict brought by Exxon, the entity with the burden of proof for its own affirmative defenses. Rather, the decision before this Court is the summary dismissal of a huge portion of the Appellant's claims without any pretense of due process. In fact, neither the Plaintiffs' Committee or the District Court ruled on the coercion/duress/fraud issue, as Exxon never properly raised the documents.

[7] Note further that most of these compensatory damages were post-1989/1990; the relevant period at trial as to compensatory and punitive damages was 1989-1995 and neither the Cook Inlet nor Nautilus Marine purported releases could be read to release either post-1989/1990 compensatory damages nor punitive damages for conduct after the date of the documents.

$4,476,644.50, respectively, of uncompensated compensatory damages from the "excess," all of which have been summarily denied Nautilus and Cook Inlet with no specific fact finding or trial by the plaintiffs' committee, district court, or jury and due process rights. Significantly, Nautilus Marine had substantial direct action compensatory and punitive damage claims for Exxon's post 1989/1990 conduct relating to the non-permissive "capture" of Nautilus Marine's dock in the post 1989 spill clean up efforts and resulting devastation to their business. Cook Inlet had similar claims. As to both Cook Inlet and Nautilus Marine, said claims and damages cannot, under any scenario, be said to have been "released" via the 1990 documents, and which they compromised in the Phase IV/Joint Prosecution Agreements/Plan of Allocation agreements in reliance on the "guarantee[8]" of the Committee that they would receive same from the "punitive" damages proceeds. Accordingly, the court must recognize that the basic rights denied, with no semblance of due process or appropriate discovery or procedure (or even factual finding regarding coercion, fraud or duress) was the right to at least obtain compensatory damages from the total proceeds as promised.

Moreover, the punitive damages jury verdict to the class was based upon all of the class plaintiffs' injuries, including Cook Inlet and Nautilus, and thus, as conceded by Exxon it would be unfair to grant a "windfall" to the other plaintiffs by forfeiting Cook Inlet and Nautilus' pro-rata share and allocating those proceeds to the other processors or plaintiffs[9]. At the time of the jury award of punitive

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[8]. See App. 69.

[9]. This is especially true when one realizes the use of these "punitive" proceeds, via either settlement or judgment, were an integral part of the Joint Prosecution

damages to the mandatory punitive damages class, both Nautilus and Cook Inlet were members of that class and signatories to the joint prosecution agreement. Thus, Nautilus and Cook Inlet's damages, and Exxon's deliberate actions undertaken with deliberate disregard of Nautilus' and Cook Inlet's rights formed part of the basis for the punitive damages award. Moreover, Exxon, by virtue of res judicata and the failure to litigate the affirmative defenses or release or accord and satisfaction, can no longer claim a defense or reduction as to the punitive damages. The proceeds, by virtue of the verdict, the Phase IV Settlement, the Joint Prosecution Agreements and the Plan of Allocation, were an award properly allocated to Nautilus and Cook Inlet, and so adjudged. The eleventh hour summary resurrection of the "release" cannot "shift" payments that were set aside for Nautilus and Cook Inlet to the other plaintiffs. To do so divests Cook Inlet and Nautilus Marine of the jury verdict finding them entitled to punitive damages and violates the common law, the Rules of Civil Procedure and the United States Constitution. The Court's actions were equivalent to a judgment notwithstanding the verdict without a proper motion and based upon "evidence" that was never admitted. Such a departure from procedural and substantive norms calls for the exercise of this Court's supervisory powers.

It must be emphasized that, as Exxon made the strategic decision not to assert the terms of the alleged "release" (a decision that benefited all plaintiffs in that the

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Agreement/Plan of Allocation/Phase IV compensatory damages compromise promise to class members of "certain" and "definite" and "guaranteed" (See App. 69) compensation for their compensatory damages and Cook Inlet's and Nautilus' reliance on same in their agreement to the Phase IV Settlement and Plan of Allocation.

particular facts of Nautilus and Cook Inlet's cases were then relied upon by the jury in setting the $5 billion punitive damages amount), as conceded by Mr. Jamin to the district court, the plaintiffs' committee never afforded any consideration or opportunity for adjudication to Cook Inlet or Nautilus Marine as to the evidence of fraud, duress or coercion.[10] Moreover, Cook Inlet made numerous and

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[10]. Mr. Jamin Stated that:

> Mr. Weidner also tells us this thing is no good. It's entered into on the basis of duress or fraud or whatever. We don't think we are the right group to present that to. If Mr. Weidner wants to present an action in this court or in state court, wherever it's appropriate, that's fine, but we don't want to be judge or jury or executioner. We simply want to follow the orders of the court.
>
> ...
>
> ...But if, Your Honor, we are right that when you assign back the right, it's extinguished; then there is nothing to play games with. And we think indeed that was a great deal of what was involved with the Court when the Court said no to the Seattle 7 agreement.
>
> Your Honor, I'd like to argue that it's more complicated than that, but that's what motivated us to make our decisions. And if we are wrong, then tell us we are wrong. But on type one we think we followed the rules of the Court as to who was a claimant in this litigation, who had a compensatory damage claim, and by virtue of that, who had a right to present a punitive damages claim.

> As to type two, we looked at the releases and we acted on those releases based upon their language. We didn't feel it was our responsibility or obligation to look at issues involving fraud or otherwise, nor do we think this is the right forum to make those decisions.
>
> ...
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> ...In fact, we did that consistent with positions we had taken with you and which you noted in both 317 and 327 in footnotes. You said these guys are telling me they are not going to give punitive damages if there is a release. And we are not going to stand here today and tell you to the contrary.
>
> We think the original orders involving the Seattle 7 were correct and they [sic] need to be the same sort of orders here today. Thank you.

(Emphasis added.)

Thus, Cook Inlet's co-plaintiffs, seeing a chance to obtain a larger share of the damages "pie" for themselves, sought to exclude the "Seattle Seven" processors from sharing in the distribution by using a policy argument that due to those processor's assignments back to Exxon, they should be excluded as Exxon should not share in the recovery of punitive damages against itself. The District Court initially so ruled, but was reversed in the Icicle Seafoods, Inc. et al and Exxon Shipping Company, et al. v. Grant Baker et al., No. 96-36038; Icicle Seafoods Inc., et al. v. Alaska Sportfishing Assoc. Inc. et al., No. 97-35036; and Icicle Seafoods, Inc. et al. v. Grant Baker et al. v. Exxon Shipping Company, et al., No. 97-35190 (the "Seattle Seven Opinions"). In an attempt to protect this position prior to the

vigorous requests to both the plaintiffs' committee and the Court for all due process rights in that regard, including discovery and jury trial. Finally, it stands basic rules of pleading and procedure on their head to claim that it was incumbent on Cook Inlet to file a declaratory judgment action as to the invalidity of the releases/assignments, when such documents were not raised as required as affirmative defenses in light of the Nautilus and Cook Inlet direct action suits against Exxon.[11] The burden of raising the issues for litigation before the jury (if they chose to do so as opposed to the self serving trial strategy and testimony actually offered by Exxon) was on Exxon via mandatory affirmative defenses.

C. THE NINTH CIRCUIT'S AND THE DISTRICT COURT'S HOLDING REGARDING COOK INLET IS ALSO IN DIRECT CONTRADICTION TO THE NINTH CIRCUIT'S DECISION IN ICICLE SEAFOODS, INC. ET AL AND EXXON SHIPPING COMPANY, ET AL. V. GRANT BAKER ET AL., NO. 96-36038; ICICLE SEAFOODS INC., ET AL. V. ALASKA SPORTFISHING

Ninth Circuit reversal, the plaintiffs' committee and district court also excluded Cook Inlet and Nautilus, even though neither Cook Inlet nor Nautilus had assigned any claims to Exxon.

[11]. Indeed, requiring a plaintiff to litigate, through summary judgment motions or declaratory judgment actions, the validity and application of all potential affirmative defenses, especially when those defenses are not being asserted by the defendant, would vastly increase the already extensive burden on the trial courts, would result in a log jam of advisory proceedings, and would shift the burden of proof, requiring the Plaintiff to disprove every potential defense, regardless of the lack of merit or procedural bars.

ASSOC. INC. ET AL., NO. 97-35036; AND ICICLE SEAFOODS, INC. ET AL. V. GRANT BAKER ET AL. V. EXXON SHIPPING COMPANY, ET AL., NO. 97-35190 (THE "SEATTLE SEVEN OPINIONS").

The Ninth Circuit in Icicle Seafoods, Inc. et al and Exxon Shipping Company, et al. v. Grant Baker et al., No. 96-36038; Icicle Seafoods Inc., et al. v. Alaska Sportfishing Assoc. Inc. et al., No. 97-35036; and Icicle Seafoods, Inc. et al. v. Grant Baker et al. v. Exxon Shipping Company, et al., No. 97-35190 (the "Seattle Seven Opinions") reversed the lower court and held that the agreements entered into by seven fish processors based in Seattle (the "Seattle Seven") to cede back their share of punitive damages to Exxon were enforceable agreements and that the Seattle Seven could not be excluded from the plan of distribution based upon those agreements. Id.

The Plaintiffs' Committee, had moved to exclude the "Seattle Seven" from sharing in the distribution of the proceeds based upon an argument that, due to the alleged assignments of those processors' rights to punitive damages back to Exxon, that Exxon should not be able to share in an award of punitive damages against itself. The District Court agreed. To protect their position as to the Seattle Seven, as evidenced by Mr. Jamin's statements (see footnote 10) the Plaintiffs' Committee also excluded Cook Inlet and Nautilus, even though no such assignment to Exxon existed. The court likewise excluded Cook Inlet and Nautilus to protect its erroneous ruling as to the "Seattle Seven." The Ninth Circuit reversed the "Seattle Seven orders," finding an abuse of discretion.

Cook Inlet is in an even stronger position than the Seattle Seven since it actually sued Exxon via a direct action,

never agreed to a cede back provision, and its inclusion in the mandatory punitive damages class, coupled with the absence of a timely suit by Exxon within the statute of limitations for an alleged breach of the agreements or timely raising of the affirmative defenses concerning the alleged releases/assignments and purported breach of same, means that there is a total bar to the use of the disputed documents to deny Cook Inlet and Nautilus Marine recovery. The plaintiffs' committee has no standing to now try to raise the issue, repudiate the vested rights under the Joint Prosecution Agreements, the Phase IV Settlement or the Plan of Allocation, and, most importantly, the jury verdict and the Seventh Amendment, and benefit their own clients by discriminating against Nautilus and Cook Inlet. The district court's and the Ninth Circuit's affirmation of the plaintiffs' committee plan is a gross deviation from established practice.

The real impetus behind the plaintiffs' committee's eleventh hour discrimination (as evidenced by Mr. Jamin's statements set forth above in footnote 10) was to protect their (and the district court's) position as to the Seattle Seven settlements (excluding the Seattle Seven from sharing in the distribution). Said position was subsequently reversed as an abuse of discretion by the Ninth Circuit.

Just as the Ninth Circuit recognized in its Icicle Seafoods/Seattle Seven ruling, the District Court's legal errors concerning the cede back arrangement and the denial of participation in the plan of allocation/distribution was an abuse of discretion, so here the legal errors committed as to allowing the eleventh hour resurrection of purported releases/assignments (by the Plaintiffs' Committee, who had no standing to do so) that were procedurally, substantively, equitably, contractually (under the joint prosecution

agreement) and as a matter of basic due process, res judicata and constitutional law, barred, constitutes grounds for reversal.

XI. SUMMARY AND CONCLUSION.

The rulings of the Ninth Circuit and the District Court depart dramatically and arbitrarily from the accepted and usual course of judicial proceedings. The jury found that Cook Inlet was entitled to punitive damages. The district court overturned that verdict and the judgment entered pursuant to that verdict and took away Cook Inlet's rights as a member of the mandatory punitive damages class to share in proceeds from the punitive damages verdict at the eleventh hour on the basis of affirmative defense(s) which were not properly pled to or considered by the jury, and were based on evidence not before the jury. In engaging in this unprecedented divestiture and departure from established procedure in violation of years of precedent, emasculating Cook Inlet's substantive and procedural rights and the express terms of the Seventh Amendment to the Constitution of the United States, the district court afforded no due process rights, no rights to a jury trail, and admittedly relied upon the recommendation of a plaintiffs' committee that refused to hear Cook Inlet's arguments regarding the merits of those documents relied upon. Thus, this divestiture, which was unconstitutional in itself, was carried out without any semblance of Constitutionally required due process or jury trial. Finally, this divestiture was based upon "evidence" which was never admitted, a legal theory never asserted, and factual issues that were never tried.

Such procedure destroys the integrity of the basic principles and procedures of a mandatory class action, and precludes any class member from relying on same, so as to

jeopardize the very basis of Federal Rule of Civil Procedure 23 class action litigation, the finality of judgments and the Seventh Amendment right to a jury trial.

This Court should exercise its supervisory power, grant certiorari and reverse and remand on the merits.

Respectfully submitted this 24th day of April, 2001.

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